NO. 2460.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

FRANK D. COOPER,
Appellant,

VS.

UNITED STATES OF AMERICA,
Appellee.

GEORGE HEATON,
Defendant not joining in appeal.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

This case, as briefly stated in appellant's brief, in his statement of the case, is one that was brought for the cancellation of the patent to certain lands comprising the homestead entry of Jay C. Freeman. The allegations of fraud and other matters set forth in the pleadings can only be fully understood by a reading thereof, so no attempt will be here made to elaborate on the statement of the case as appellant has stated it and we content ourselves with replying to the argument of counsel for appellant as set forth in his brief.

ARGUMENT.

Appellant, in the same manner as he did in the companion case No. 2461, after a few general comments on the evidence in the case proceeds to state that there is no evidence to sustain the findings of the court of the decree appealed from and cites a few cases to show that his contention is correct. It seems that when one makes such a sweeping charge he at least should attempt to summarize the evidence in the record and so there may, apparently at least, be something to sustain his contention before the court. We earnestly contend that there is more than ample evidence in the case at bar to sustain the decree and that it is most convincing, indeed, not only greatly preponderates, but, is only met with the defendant Cooper's half hearted denials and usual inability to recollect anything.

The witness Foley testified: that he was a special agent in the General Land Office; that he examined the Freeman entry about the 16th day of September, 1906; he had had occasion to examine almost all the land in the same township; had identified many corner stones and knows particularly the tract under consideration, which was within an enclosure including other lands; that he found the following improvements when he examined the land: a 12 x 16 frame cabin with a shingle roof; the cabin had no window in it; no stove pipe hole or chimney; it had a door frame or opening where a door could go but door in it; he found that the door frame was absolutely untouched and unmarred

by screws, nails or hinges, or anything of that sort; the cabin had never been used; that Mr. Cooper owned the enclosure within which this land was and resided in the next township east of the one this entry was in. There was no fence on the entry proper, except that it was intersected by a piece of fence; there was no fence surrounding the entry on its outer lines; he was over the land a number of times; the cabin was on the outer edge of the Cooper enclosure; there was no plowed ground on the land; there had been no cultivation on the entry; (Tr. pp. 45-48).

William L. Kinsey, testified: that he had lived in Township 19 N., R. 3 W., since April 1904, which is the one the entry is in; knew Cooper twenty-four years; Freeman worked for Cooper during the year 1904; knew Freeman's entry, first saw it in February or March 1904, had been over the entry five or six times before the making of final proof by Freeman; prior to final proof the erection of a cabin had been started on the claim, the east and west sides of the cabin had been put up, one or two boards and a pair of rafters on each end; there was no floor or roof on the cabin at that time; that a Mr. Gardipee finished up the house in June of that year by putting on the roof and the ends. The witness was with Mr. Foley when he inspected the claim and then the cabin was as Foley stated it was; he never saw any land broken up on the claim and it was never fenced at the time final proof was made; (Tr. pp. 48-50).

Edwin R. Jones testified: that he was acquainted with the Freeman entry; first saw it in the early spring of 1905; saw the cabin on it; the cabin had no door or window; there was no fence on the land; Freeman was a sheep herded or camp tender for Mr. Cooper; when he first saw the house it looked as though it had just been built and had never been inhabited; that it might have been built a year but no longer; he first met Freeman in 1904, (Tr. pp. 50-51).

Frank J. Kinsey, testified: that he had lived around the country there for 24 years; that he first saw the Freeman entry in 1902 while riding after horses; that he moved on a claim of his own in section 21, same township, in April 1904; he knows the Freeman entry and there wasn't anything on it when he first saw it in 1902; the next time he saw it was in February or March 1904 and there was a house on it at that time, but the house had no roof on it, or ends in it, just sides; there was no furniture, floor or cooking utensils in it; there was some more work done on it—a shingle roof, floor and ends put on and hole cut for door but no hole for a window or stovepipe hole or chimney; never saw anyone living on the claim; there were no other improvements on the claim; Freeman was working for Cooper in June or first of July, 1904; witness saw Cooper in and around Freeman's claim a great many times; from the time he was up in that country from April 1904 Cooper was up in that part of the country a great many times. (Tr. pp.

52-53).

John Lavergure testified: that he was a ranch hand and knew Cooper in 1904 or 1905; knew Freeman before that time; Freeman worked for Cooper at same time witness did; that he knew the Freeman claim; that he had been on it but never saw any one living on it; when witness worked for Cooper the cabin on claim had no door in it; Freeman worked running sheep for Cooper in a lambing camp. (Tr. p. 54).

John Gardipee, Sr., testified: that he had known Cooper for ten years; that in 1903 he moved out to claim one mile from the Freeman entry and was acquainted with the Freeman entry; that when he first saw the house on the Freeman entry, there were two sides on it and the rafters but no roof or floor. Witness further testified that he was the man referred to by other witnesses as the one who completed the house; that he put the ends and roof on the house about August, 1904, and settled with Mr. Cooper for the work after it was done; that there were no other buildings on the entry when he first saw it. He first talked with Cooper about doing the work. (Tr. pp. 56-57).

John B. Gardipee, testified: that in the years 1902, 1903 and 1904 he was out near the Freeman entry working nearly all the time and noticed Cooper travelling through there off and on. That before John Gardipee, Sr., had done the work, he testified to on the house, it had only two sides on it, no roof, floor in it and there was no fence on the

land. Freeman worked for Cooper all of 1902 and 1903 and a part of 1904. (Tr. p. 58).

William M. Belgrade testified: that when he saw the cabin in 1905 there was no door in it. (Tr. p. 59).

The testimony given by Richard T. Loss and William S. Kirkland, as witnesses for Freeman upon submitting final proof of compliance with law for his homestead, was introduced in evidence and both of said witnesses testified as follows:

I am well acquainted with the claimant (Freeman) and the land embraced within his claim; it is grazing land only, cannot be cultivated; Claimant settled upon the homestead July 2nd, 1902, built a house and established residence; claimant is unmarried and has been upon the homestead most of the time since first establishing residence on it; claimant has worked out some, and as to absences from the land the total does not exceed three months in any one year since entering the land; none of the land has been broken up as it is most valuable for grazing in its natural condition; the land is too rocky to admit of being broken up and cultivated and has been used only as grazing land, about 50 head of stock have been grazed there; the improvements on the land are a 16 x 18 house with shingle roof, all fenced, post and three wires, irrigation ditch through it, value of improvements $400.; not interested in entry and think claimant has acted in good faith, (Tr. pp. 61-63).

The testimony given by Freeman upon making

his final proof before the land office for his entry was introduced in evidence and is as follows:

I am the identical person who made homestead entry for SE ¼ SW ¼ Sec. 8, E ½ NW ¼, and SW¼ NW ¼ Sec. 17, Tp. 19 N. R. 3 W. on July 2, 1902, and claim the same; I first built my house on the land in July 1902 and settled and established residence; house is frame, 16 x 18 feet, shingle roof, all land fenced with 3 wires and posts of cedar one rod apart; ten acres of land in grass seed and irrigated; value of improvements $400.00; I am unmarried; have been away from land working for wages; my total absence will not exceed more than three months in any one year since entry. The land is not fit for cultivation and is used for grazing 50 head of stock each year; none of it is cultivated; it is grazing land only and cannot be used advantageously for any other purpose. I have no other personal property except on claim. (Tr. pp. 65-67).

The final affidavit of said Freeman final in the land office at the time of applying to make final proof contained the following statement: "That I have made actual settlement on and cultivated and resided upon said land since the 2nd day of July, 1902, to the present time." (Tr. p. 68).

In addition to the foregoing the appellee, himself, testified that he moved into the township where Freeman's claim was, in 1876, and two or three years later took up a homestead; that Freeman had worked for him but he didn't remember when it was. The rest of appellee's testimony was almost

entirely a statement that he did not recollect this or that. Indeed, it is remarkable that a man of "large affairs," such as it is contended that Cooper is should have purchased land so recklessly without regard even to its quality, improvements or anything except that a deed was delivered upon the payment of the purchase price.

The rest of appellant's testimony was merely that he did not remember; he kept no books to show when Freeman worked for him; he did not remember of Freeman having filed upon the land, or whether he accompanied Freeman to the land office when any papers were made out either to file or in and about the final proof; he did not remember whether the deed was made at the time of final proof or later, but it was about at that time he said (Tr. p. 79). He did not remember whether Gardipee had ever fixed the cabin, but said, if Gardipee had, it was done after Freeman had sold it to him. In fact his entire testimony was composed entirely of either denials of the positive testimony given by appellee's witnesses or statements that he had no recollection about the matter.

It seems incredible that a man of Cooper's business ability should have so conducted himself in and about the purchase of land that he would purchase even a hundred and sixty acres of grazing land without at least remembering whether he had ever seen it prior to such purchase. He testified that he lived in the neighborhood from 1876 to 1910 and in all but three years of such time had had

a homestead in said township with the claim under consideration. His ownership of 21,000 acres of land in the vicinity of this claim does not bespeak well for the truthfulness of his statements that he knew nothing about the Freeman entry before he purchased it. Is it possible that a man, who purchased such a vast tract of land as is shown by the record Cooper did, would pay two, four or six hundred dollars or more without having examined any portion of it prior to paying the consideration therefor. Cooper admits that Freeman had worked for him, but cannot remember whether it was in 1901, 1902, 1903, 1904, 1905 or 1906, or any specific year.

The testimony of the witnesses Short and Belgarde (Tr. pp. 55-57; 58, 59), was certainly admissible to show the usual method employed by appellant in obtaining title to land from the United States. Short testified that he was to receive something like $100.00 for using his filing right for Mr. Cooper (Tr. p. 55); Short never saw the land; the description and papers were furnished by Cooper and Cooper paid the filing fees (Tr. p. 55). Belgarde also filed on a piece of land at Cooper's suggestion, and Cooper must have paid for making out the papers and the filing fees; he (Belgarde) never did; (Tr. pp. 58 and 59).

In cases of this kind it is seldom, if ever, possible to secure direct proof of the fraudulent acts of a party, for, from the very nature of things, persons, who are engaged in the business of acquiring

land from the United States and building up a vast domain such as Cooper had, do not work openly. On the contrary, such persons are careful that no written evidence of their scheme to obtain the land is valuable and no one except the entryman who is duped into taking up the land for a few paltry dollars is present. Indeed, it is remarkable that a man of apparently good standing in the community will go into the business of acquiring land, as Cooper did in the present instance, and, when the United States objects to its land laws being abused, protest that they have always been acting in good faith and are purchasers for a valuable consideration, when in truth and in fact they have watched men like Freeman file upon claims and seen the land laws more honored in their breach than observance. The most unobserving persons in Cooper's position would have been compelled to notice that Freeman's entry was sham and a fraud and unless like Cooper were desirous of acquiring it would have denounced it for what it was a palpable attempt to defraud the government.

In the case of U. S. v. Stimson, 197 U. S. 200-207, cited by appellant on page 14 of his brief, the decision of the court was based upon the fact that forty years had elapsed since the commission of the alleged fraud and the institution of the suit and the purchaser from the patentees had held the lands and obtained large credits on the strength of being such owner, and the creditors were equitably entitled to protection. This together with the weak-

ness of the evidence was the reason for said decision, but the poor quality of the evidence was not alone the basis of the decision.

In the case at bar we have no such considerations as there were in the Stimson case, *supra;* here Cooper had retained the lands, and only a few years had elapsed and no rights of creditors are involved.

Appellant seems to argue that because he purchased this land from Freeman without any knowledge that the United States claimed Freeman had not complied with the law, that he is an innocent purchaser for value. But a man cannot sit idly by and live in the neighborhood of a piece of land and the land bought by him, and say that he was innocent of what Freeman had done. A man cannot close his eyes, as Cooper desires this court to believe, and then profit by his endeavors to notice nothing. He must have known on August 18, 1904, when he purchased the land, that Freeman had worked for him herding sheep for several years prior thereto, and knowing that Freeman was so in his employ, he, an experienced sheepman, knew that Freeman did not herd sheep at some remote portion of Cooper's 21,000 acres and return to the claim every night, or even maintain a "continuous residence" as the law required a homesteader to do. It was not incumbent upon the United States to notify Cooper, or anyone else, that it would insist on a cancellation of the patent within the statutory period, if it discovered that Freeman had practiced a fraud in making his final proof. Indeed, Cooper

was so anxious to secure this land that he could not even wait until a final receipt or certificate had issued for it, but purchased it on August 18, 1904, the same day final proof was made and five days before the final receipt or certificate issued, and about six months before patent issued (Tr. pp. 6-9; 14; 23; 24). It is absurd to say that a man who owns a large tract of land, "a man of large affairs," is by reason of that fact not expected to know what is being done with a piece of land near which he had lived, on which he grazed sheep, in whose service the entryman had been engaged for several years prior to the final proof and purchase.

We most respectfully submit that the evidence in this case shows most conclusively: That Freeman never complied with the law so as to entitle him to a patent; that both Freeman and his witnesses on the final proof hearing are shown to have been most reckless with the use of the truth; that the statements contained in the testimony given on the final proof hearing were absolutely false and were made for the sole purpose of deceiving the officials of the United States Land Office; that Cooper was aware of all that transpired in and about the homestead of Freeman and particularly as to the improvements never existing as the final proof witnesses said they did and that no residence was ever established or maintained as was claimed. Cooper does not deny that the testimony given at the final proof hearing was false but contents himself with asserting that he knew nothing about it.

He bases his good faith upon what was contained in the final proof and its acceptance by the officials of the land office, but his knowledge of the country and the doings therein acquired by nearly thirty years residence and the fact that Freeman had been in his employ for several years immediately prior to the making of the final proof must have advised him that a fraud was being perpetrated and he cannot claim he was without fault. The mere fact that the title he bought was nothing but one based on a final receipt, issued five days after the purchase, was a thing that should have put him upon inquiry and if he neglected to inquire into the bona fides of the entry and his neglect is no protection to him. His "large affairs" and enormous land holdings alone show that he was a man well versed in the ways of the world and particularly with all the details of acquiring the public domain. Cooper's pretended ignorance of what Freeman had done on the claim and lack of knowledge as to what residence a man had in such close proximity for a period of over five years is a circumstance in itself that brands Cooper with a guilty knowledge of the fraud. Indeed, his statement that he knew nothing of the final proof proceedings is shown to be false as the deed was dated on the same day and undoubtedly was for the purpose of securing to Cooper the fees and price paid the United States at the final proof hearing otherwise why such haste to take a deed for land for which no land office certificate had yet issued.

THE DECREE.

It is contended by the appellant, that this action having been brought for the purpose of having cancelled a patent issued to the entryman of the land in question, the court could not make or enter any decree except a decree cancelling the patent or a decree dismissing the bill of complaint, and that more than six years having elapsed between the date the patent was issued and the date when the defendant Heaton was made a party to the action, the defendant Heaton in his answer having pleaded an interest in the lands and the statute of limitations, the court could not enter a decree cancelling the patent and could only enter a decree dismissing the bill of complaint.

In order to arrive at a proper understanding of the contention of the appellant it is necessary to review briefly the pleadings in this action and a portion of the evidence taken by the Examiner in Chancery.

In the original bill of complaint the appellant Cooper was named as the sole defendant. After alleging certain acts which constituted fraud on the part of the entryman, the bill of complaint alleged that the appellant Cooper knew, at the time he purchased the lands, of the fraud perpetrated by the entryman and purchased the land with full knowledge thereof. The bill of complaint was filed on December 7th, 1909. The appellant appeared and filed his answer to the bill of complaint on

March 29, 1910. In his answer the appellant, after certain making certain admissions and denials, alleges that before the commencement of the suit he had entered into a contract with one George Heaton, whereby he had agreed to sell said land to said George Heaton for a valuable consideration, and that the said Heaton, without any knowledge of any fraud on the part of the entryman, had purchased said land from the appellant Cooper. (Tr. p. 26). Upon the filing of the appellant's answer in which the purchase of the land by Heaton was alleged, the appellee obtained an order directing that George Heaton be made a party defendant, and permitting the appellee to amend its bill of complaint so as to state the case as to him, (Tr. p. 28). After obtaining this order the appellee amended its complaint by making certain interlineations in the original bill of complaint, by adding thereto an additional paragraph numbered "Eleventh" and by adding to the prayer a provision asking for the cancellation of the contract for the sale of said land referred to in the appellant's answer. (Tr. pp. 29-31). All of these amendments are indicated in the transcript by underscoring, so that it may be readily seen from the transcript the diference between the original bill of complaint as filed and as the same stood after these amendments were made. (Tr. pp. 2-18). After the making of this order and the amending of the bill of complaint, the defendant Heaton filed his answer on December 2nd, 1912, (Tr. pp. 33-40), in which, after making certain ad-

missions and denials, he alleged that on December 13th, 1909, the appellant and defendant entered into a contract for the sale of said land, together with other lands, by appellant to defendant, at $5.70 an acre, and that on the 22nd day of April, 1911, the defendant Heaton had assigned, sold and transferred all of his interest in said contract to the Great Falls Farm Land Company, (Tr. pp. 37-39). To each of the answers of the appellant and defendant the appellee filed its replications, (Tr. pp. 27 and 40).

It will be seen from this review of the pleadings, that the action was originally commenced against the appellant Cooper for the purpose of cancelling a patent to certain lands, that after the appellant filed his answer alleging that he had parted with his title to said lands under a contract for the sale thereof to the defendant Heaton, the bill of complaint was amended so as to make Heaton a party defendant and so as to state a case as to him, and that thereupon the defendant Heaton filed his answer alleging that he had acquired an interest in said lands by virtue of having entered into a contract for the purchase thereof with the appellant Cooper, but that this defendant had thereafter parted with his interest in said lands by assigning and transfering said contract to the Great Falls Farm Land Company.

After the appellee had introduced its evidence in support of the allegations contained in its bill of complaint as amended, the appellant and defend-

ant introduced evidence in rebuttal thereof and also in support of the allegations in said answers that the appellant Cooper had entered into said contract to sell said land, together with other lands, to the defendant Heaton.

The appellant Cooper, testifying in his own behalf and that of the defendant Heaton, stated that he had sold said lands which he had purchased from the entryman, (Tr. p. 70). There was thereupon introduced in evidence a contract between the appellant Cooper and the defendant Heaton for the sale of said lands, together with other lands, by appellant to the defendant, (Tr. pp. 71 to 78). This was all of the evidence introduced to prove these allegations as to the contract and sale by the appellant to defendant.

From an examination of this contract, introduced in evidence, we find that on December 13th, 1909, four days after the filing of the bill of complaint against the appellant, the appellant and defendant Heaton entered into said contract; that this contract provides for the sale of 21,840 acres of land, including the land involved in the action, at the rate of $5.70 an acre, payments to be extended over a period of years, the last payment becoming due October 1, 1914, and no deeds to be delivered until final payment made.

It will be observed that while the defendant Heaton in his answer alleged that he had parted with all of his interest in said contract by assigning and transferring the same to the Great Falls Farm

Land Company, no evidence whatever was introduced to show an assignment, so that as the evidence now stands we find that a contract was entered into between the appellant and defendant Heaton, and that Heaton still holds and retains said contract.

The court, in its decree, found that all of the allegations of the bill of complaint as to the fraud of the entryman were fully sustained by the proof; that the allegations of said bill of complaint that the appellant had full knowledge of such fraud at the time he purchased said land was fully sustained by the proof; that a contract for the sale of said land was entered into between the appellant Cooper and the defendant Heaton; that more than six years had elapsed between the date of issuance of patent and the date of the order directing the making of Heaton a party defendant to said action and that it was therefore impracticable to cancel said patent; that the value of said lands was $5.70 an acre; (Tr. pp. 41-43).

All of these findings of the court are fully sustained by the proof. We have heretofore considered the evidence introduced to prove the fraud on the part of the entryman and the knowledge thereof by the appellant Cooper so that it is not necessary to examine this evidence here. The contract introduced in evidence supports the finding of the court as to the existence of the contract, while the date of the issuance of patent, as alleged in the bill of complaint, and the date of the order directing that Heaton be made a party defendant show

that more than six years elapsed between these dates and sustain this finding. Appellant contends, however, that there is no evidence as to the value of the land. We take it, that it is a principle of law that cannot be contradicted that all of the evidence must be taken and considered together, and that evidence introduced on the part of a defendant which tends to prove the plaintiff's case will be considered in connection with the plaintiff's case in exactly the same manner as though such evidence was introduced by the plaintiff. This being true we have in evidence the contract between the appellant and the defendant Heaton in which it is stated that this land, together with other lands, is to be paid for at the rate of $5.70 an acre. Here then is direct proof introduced by the defendant showing the value of the lands, the value which the appellant was willing to accept and the defendant Heaton willing to pay. This evidence is sufficient to sustain the finding of the court as to the value of the lands.

But whatever the findings of the court may have been, the appellant strenuously contends that the action having been brought to cancel a patent the court could not enter a decree refusing to cancel the patent, but decreeing that the value of the land, with interest thereon, should be paid by appellant to the appellee, or if the appellee failed to pay the same that the defendant Heaton should pay the amount and withhold the same out of the purchase price under said contract remaining unpaid, and

that the appellee should have a lien on said land for such amount and foreclosure of such lien, and that such decree as entered is not sustained by the pleadings in the case.

In support of this contention the appellant cites a number of authorities. Upon an examination of these authorities we believe that the only authority cited which is at all in point is that of Crocket vs. Lee, 7 Wheat. 523, and appellant certainly must possess a most optimistic mind if he can obtain any satisfaction out of that particular decision. None of the other cases cited by appellant, when the subject matter of each particular case is considered, have any application to the case at bar.

At this time it is well to remind appellant that he alone is appealing from the decree entered in the lower court. The defendant Heaton seems to be well satisfied with the decree entered as he refused to join in this appeal and an order of severance was made (Tr. pp. 89-90), permitting the appellant to appeal.

We are free to confess that if evidence had been introduced by appellant and defendant showing that the defendant Heaton had transferred his interest in said contract to the Great Falls Farm Land Company, as he alleged in his answer, no decree could have been entered which would have been binding on either the defendant Heaton or on the Great Falls Land Company, but in the absence of such evidence does the appellant mean to contend that the court could not enter a decree which would be binding

on Heaton, particularly where, as in this case, he will suffer no injury whatever by reason thereof? The court found that fraud was committed by the entryman and that the appellant purchased the land with full knowledge of such fraud but that the defendant Heaton had no such knowledge. The decree is to the effect that the appellant Cooper, who became the owner of said land with knowledge of the fraud of the entryman, is the one who is to suffer. Heaton suffers no injury, he is simply directed to pay out of the amount he still owes the appellant Cooper the value of the lands with interest. It could make no difference to the defendant Heaton whether, in the absence of the decree, he should pay the balance of his purchase price to the appellant, or whether, the decree being entered, he pays the value of the land with interest to the appellee, retaining such amount out of the balance due the appellant under the contract. In either case he will pay the full purchase price for all of the lands covered by the contract, no more and no less. This being true the appellant then comes into this court on this appeal, with the findings of the court sustaining the allegations of the bill of complaint as to fraud on the part of the entryman and knowledge of such fraud by the appellant at the time he purchased the lands, and says, that because the action was an action to cancel the patent and the court found it impracticable so to do, he ought not to be required to make restitution, and that notwithstanding his participation in the fraud or the

fact that he has been benefitted thereby when he had knowledge thereof, he should be permitted to go hence without being compelled to suffer in any way for his own wrongful and unlawful acts. He comes into court with unclean hands and contends that even if he did have knowledge of the fraud of another whereby the appellee was injured and he was benefitted by that fraud he should be permitted to continue to enjoy such benefits and the appellee should have no recourse against him for such injury. The rules of equity which require that one who seeks equity must do equity and that one cannot come into a court of equity with unclean hands and ask for equity apply with all their force to this particular case. While the bill of complaint asks for the cancellation of the patent, yet, the decree as entered, while refusing to cancel the patent, requires nothing more than that equity and justice be done between the parties benefitted and injured by the fraud practiced by the entryman.

The prayer of the bill of complaint, as amended, asks for specific relief, the cancellation of the patent, the deed from the entryman to the appellant and the contract between appellant and defendant, and also asks for "such other and further relief in the premises as the circumstances of this cause may require, and as to this Honorable Court may seem meet and proper, and as shall be agreeable to equity and good conscience," (Tr. p. 17).

Under a prayer for general relief a court of equity will extend relief beyond the specific prayer

and not exactly in accordance with it and any relief that is agreeable to the case made by the pleadings can be granted under such a prayer, a court of equity having power to adapt its remedies to the circumstances of each particular case as developed by the pleadings and evidence, and in this case it was the duty of the court, after finding it was impracticable to cancel the patent, as prayed for in the specific prayer of the bill of complaint, by its decree to adopt and prescribe such remedies as would require justice to be done between the parties.

In the case of Walden vs. Bodley, 14 Peters 156, Justice McLean, in delivering the opinion of the court, said:

> "But the court have, by the bill, answer and evidence, the equities of the parties before them; and having jurisdiction of the main points, they may settle the whole matter. A court of equity cannot act upon a case which is not fairly made by the bill and answer. But it is not necessary that these should point out, in detail, the means which the court should adopt in giving relief. Under the general prayer for relief, the court will often extend relief beyond the specific prayer, and not exactly in accordance with it."

And in this case the court, having found it impracticable to cancel the patent, but having a case fairly made by the bill and answers, it was within its power to, by its decree, adopt such remedies as would do justice between the parties.

In Lockhart vs. Leeds, 195 U. S. 427, Justice Peckham, who delivered the opinion, said:

> "Again it is alleged that the bill prays that the location of what is called the Washington Lode by the defendants be declared void, and that the plaintiff may have the possession of the claim, while the plaintiff now asks to have the defendants treated as constructive trustees, etc., which is inconsistent, as alleged, with the former prayer for relief. The bill contains a prayer for general relief in addition to the prayer for special relief, and under such prayer this relief may be given. It is objected that under the prayer for general relief no relief of that nature can be granted, inasmuch as it is opposed to the special relief asked for by the bill, and also because the general allegations of the bill do not justify such relief. All of the facts upon which the plaintiff seeks relief from a court of equity are clearly stated in the bill. The facts constituting the fraud are set forth, and it is alleged that the parties doing the acts mentioned concealed them from the plaintiff for the purpose of defrauding plaintiff out of his interest and ownership in the mine. Having set out all the facts upon which the right to relief is based, the plaintiff asks specially for the possession and also for the proceeds of the mine, because by reason of the facts, the location made by the defendants was a void location. Whether it was a void location or not, was a matter of law arising from the facts appearing in the bill. Those facts were not changed in the slightest degree, nor were any

inconsistent facts set up thereafter. The plaintiff now under his prayer for general relief contends that, although the location of the Washington lode by the defendants may have been so far valid as to create a title in the defendants, yet that by reason of the fraud already distinctly set forth in the bill the plaintiff was entitled to avail himself of that title, and to hold them as trustees ex maleficio, for his benefit."

"There is nothing in the intricacy of equity pleading that prevents the plaintiff from obtaining the relief, under the general prayer, to which he may be entitled upon the facts plainly stated in the bill. There is no reason for denying his right to relief, if the plaintiff is otherwise entitled to it, simply because it is asked under the prayer for general relief and upon a somewhat different theory from that which is advanced under one of the special prayers. The cases of English vs. Foxhall, 2 Pet. 595; Boone vs. Chiles, 10 Pet. 177; Hobson vs. McArthur, 16 Pet. 182; Hayward vs. National Bank, 96 U. S. 611; Georgia vs. Stanton, 6 Wall. 50, are not opposed to the views just stated."

See also:

Watts vs. Waddle, 6 Pet. 389;

Ridings vs. Johnson, 128 U. S. 21;

Tayloe vs. Merchants, 9 How. 390;

Stevens vs. Gladding, 17 How. 447;

English vs. Foxhall, 2 Pet. 595;

Sage vs. Central Ry. Co., 99 U. S. 334;

Hepburn vs. Dunlop, 1 Wheat. 179;

Wiggins Ferry Co. vs. O. & M. Ry. Co., 142 U. S. 396.

In Tyler vs. Savage, 143 U. S. 79, the court, speaking through Justice Peckham, said:

> "The relief against Tyler was properly granted under the prayer of the bill for general relief. It was consanant with the facts set out in the bill as a ground of relief against Tyler personally and it was relief agreeable to the case made by the bill."

The rule, that when a party shows by a bill of complaint facts which entitle such party to equitable relief such relief, as may be agreeable to the case made and the evidence in support thereof, may be granted under the prayer for general relief, is followed in the Federal courts and in most, if not all of the state courts.

> "The special relief prayed in this bill is to quiet title or remove a cloud, but there is also a prayer for general relief. Upon the state of facts set forth by the bill I am of the opinion that plaintiff cannot have the special relief he prays, but rather would be entitled to a decree declaring him to be entitled to the legal estate and that the defendants hold the same in trust for his use and benefit, and for a conveyance

of the same to him, etc. But misapprehension by the plaintiff as to the special relief he is entitled to is no ground for demurrer where there is a prayer for general relief, for in such a case, if the bill sets out facts showing a right to relief the court will grant the proper relief under the general prayer."

Patrick vs. Isenhart, 20 Fed. 339;

Adams vs. Kehlor Mill. Co., 36 Fed. 212.

"Under our statutes and the practice which must prevail in courts whose law and equity powers are blended like ours, it would clearly appear that, in a case like the present, where plaintiffs have brought a civil action for the enforcement and protection of their rights, or the redress and prevention of their wrongs, it is the duty of the court to grant such relief as the complaint and the proof made thereunder, show them entitled to receive, without any distinction between law and equity. If they have a remedy at law let it be enforced; and if the remedy is an equitable one let it be applied in like manner."

Leopold vs. Silverman, 7 Mont. 266.

"If the prayer of a bill in equity is for general as well as special relief the court has power to mold the decree to meet the case made on the record."

Spevey vs. Frazer, 7 Ind. 661;

Pensacola & G. R. Ry. vs. Spratt, 12 Fla. 26.

"When the relief granted is not repugnant to the facts alleged and proved it is properly granted, altho not specifically prayed for, under the prayer for general relief."

Penn vs. Folger (Ill.) 55 N. E. 192.

"A court of equity, having jurisdiction of the parties and the subject matter, will make its jurisdiction for complete relief."

Ober vs. Gallagher, 93 U. S. 199.

"Equity, having obtained jurisdiction of the principal question, will proceed to give such complete relief as the justice and equity of the case may require."

Hopburn vs. Dunlop, 1 Wheat. 179.

"A general prayer for such relief as may be just and equitable warrants the court in granting to the plaintiff such relief as the facts upon the trial justify."

Finlayson vs. Peterson, (N. Dak.) 57 Am. St. Rep. 584.

See also:

Vol. 39 Cent. Dig. Plead. 143-144.

In this case the decree granted relief which was not inconsistent with the allegations of the bill of complaint. It is true that the decree did not order the patent cancelled, but it granted the appellee relief from the fraud practiced by the entryman by taking from the appellant, who knew of the

fraud, the benefits he derived therefrom, and giving such benefits to the appellee who was defrauded. That, to which the appellant was not entitled, was by the decree taken from him, and given to the appellee to reimburse it for the land out of which it had been defrauded. The relief granted by the decree was consistent with the case made by the pleadings, not the bill of complaint alone, but all of the pleadings in the case, and adjusted the equities between the parties. If the findings of the coure are correct and the appellant knew of the fraud practiced upon the appellee then in equity and good conscience he ought not to be permitted to reap the benefits of such fraud, and all that the decree does is to take from him these benefits and give them to the party who was defrauded. The decree was properly entered and should be sustained.

In the event, however, that this court should find that the allegations set forth in the bill of complaint are not sufficient to sustain the decree, we submit, that in view of the evidence taken in the case and which does fully sustain the decree, this court should remand this case to the lower court with directions to so amend said bill of complaint that the same will conform to the evidence and sustain the decree.

> "When the facts of the case show the plaintiff to have an equitable title to relief, this court, while it may be unable to afford such relief upon the case made by the bill, may re-

mand the case to the court below for an amendment of the pleadings and such further proceedings as may be just."

Wiggins Ferry Co. vs. O. & M. Ry. Co., 142 U. S. 396;

Crocket vs. Lee, 7 Peters 522;

Watts vs. Waddle, 6 Pet. 389;

Walden vs. Bodley, 14 Pet. 156;

Neale vs. Neale, 9 Wall. 1;

Harden vs. Boyd, 113 U. S. 756;

Adams vs. Kehler Mill Co., 36 Fed. 212;

Jones vs. Meehan, 175 U. S. 1;

Liverpool etc. vs. Phenix Ins. Co., 129 U. S. 39.

Respectfully submitted,

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